No. 25-26

IN THE NEBRASKA SUPREME COURT

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES,
Petitioner-Appellant,

v.

STATE OF NEBRASKA,
Respondent-Appellee.

On Appeal from the Commission of Industrial Relations
The Honorable Gregory M. Neuhaus, William G. Blake, and Dallas D. Jones

BRIEF OF APPELLEE

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Statement of Jurisdiction

The Nebraska Association of Public Employees ("NAPE" or "the Union") appeals from a decision of the Nebraska Commission of Industrial Relations ("CIR" or "the Commission") concerning its allegations that the State engaged in a practice prohibited by the Industrial Relations and Collective Bargaining acts. *See* Neb. Rev. Stat. §§ 48-801 to 48-839; 81-1369 to 81-1388. Specifically, NAPE charged that the State refused to engage in good-faith bargaining. *See* (T3–13) (petition); (T264–73) (CIR order); *see also* Neb. Rev. Stat. § 81-1386(2)(e).

A party "aggrieved by" a decision or order of the CIR that resolves a prohibited practice claim may appeal directly to this Court. Neb. Rev. Stat. § 81-1387(3). *Cf. Fraternal Order of Police Lodge #88 v. State*, 316 Neb. 28, 36–41 (2024).

Statement of the Case

Nature of the Case. In early November 2023, Governor James D. Pillen, acting as Chief Magistrate and ultimate supervisor/manager of (most though not all) Nebraska's public employees, issued Executive Order 23-17. (Vol. VI, E502, p. 1–2) (the "Remote Work Order"). The order declared that, starting January 2, 2024, covered public employees "shall perform their work in the office, facility, or field location assigned by their agency and not from a remote location," subject to certain exceptions. (Vol. VI, E502, p. 1).

NAPE's initial response to the Remote Work Order was a demand to bargain. (T4–6); *see also* (Vol. II, E2, p.1). Bargaining was not required under the terms of the relevant collective bargaining agreement ("CBA"), so that request was denied. *See* (Vol. III, E1, pp.1–240) (full text of current CBA). NAPE then filed a

prohibited practice petition with the Commission alleging that the State had refused to negotiate in good faith. *See* (T4, 12); *see also* Neb. Rev. Stat. §§ 48-824(1), (2)(e); Neb. Rev. Stat. §§ 81-1386(1), (2)(e).

Issues Presented in the Commission. NAPE asserted that whether the State could establish a default rule of in-person work and exercise control over the permissible contours of remote work was subject to mandatory bargaining. NAPE thus claimed the State had engaged in a prohibited practice when it declined to bargain over remote work. The State disagreed.

Resolution of the Issues Presented. The CIR dismissed NAPE's petition with prejudice. (T273). It concluded that the CBA plainly reserved to management (the State) the power to determine employee work sites and that, in the alternative, NAPE had proposed—but later withdrew—the inclusion of a clause addressing remote work, and thereby waived any right to bargain on the subject for the duration of the CBA.

Upon the State's request for attorneys' fees, the Commission concluded the petition was frivolous and had been motivated by bad faith. Accordingly, it granted the State's request.

Scope of Review. This Court will disturb an order or decision of the CIR only if the Commission has acted "without or in excess of its powers," if the order was "procured by fraud or is contrary to law," if the facts found "do not support the order," or the order is not "supported by a preponderance of competent evidence on the record considered as a whole." *Hyannis Educ. Ass'n v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 963 (2005); *see also* Neb. Rev. Stat. § 48-825(4).

PROPOSITIONS OF LAW

1. When "a topic is covered by [a] collective bargaining agreement, then the parties have no further obligation to bargain the issue." *Fraternal Ord. of Police Lodge 31 v. City of York*, 309 Neb. 359, 372 (2021).

2. A topic is "covered by" a CBA when it is "'within the compass' of the terms of the agreement." *City of York*, 309 Neb. at 373.

3. "In determining whether [a subject] is covered by a collective bargaining agreement, [courts have] consistently . . . rejected . . . attempts to require [the CBA] to specifically mention, specifically refer to, or specifically address" the subject in question. *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 376 (D.C. Cir. 2017)

4. It is "possible for employees or their representatives to waive the right to bargain" on an otherwise mandatory subject of bargaining. *Serv. Emps. Int'l Union (AFL-CIO) Loc. 226 v. Douglas Cty. Sch. Dist. 001*, 286 Neb. 755, 765 (2013).

5. "[W]here a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter which was withdrawn would be found." *Fed. Lab. Rels. Auth. v. I.R.S. (Dist. Off. Unit), Dep't of Treasury*, 838 F.2d 567, 569 (D.C. Cir. 1988).

6. Management prerogatives, including "the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments" are "not mandatory subjects

of bargaining." *Scottsbluff Police Officers Ass'n, Inc., F.O.P. Lodge 38 v. City of Scottsbluff*, 282 Neb. 676, 683 (2011).

7. "The geographical assignment of individual employees is ordinarily within the discretion of the employing agency." *Tiltti v. Weise*, 155 F.3d 596, 601 (2d Cir. 1998).

8. "Non-lawyers would readily understand that regular on-site at-tendance is required for [most] jobs." *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015).

9. "The CIR has the power and authority to make such findings and to enter such temporary or permanent orders that it may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in § 48–802, and to resolve the dispute." *Emps. United Lab. Ass'n v. Douglas Cty.*, 284 Neb. 121, 129 (2012).

10. "[P]roceedings before the [CIR]" shall "conform to the code of civil procedure applicable to the district courts of the state." Neb. Rev. Stat. § 48-812.

11. Nebraska's code of civil procedure authorizes district courts to "assess attorney's fees and costs" when it is determined that "an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment." Neb. Rev. Stat. § 25-824(4).

12. A legal argument is frivolous when it is "wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit." *George Clift Enterprises, Inc. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 816 (2020).

Statement of Facts

In (at least) the last three CBAs governing the labor relationship between the State and public employees represented by NAPE, the State's right to "increase, reduce, change, modify and alter the composition and site of the work force" has been expressly reserved. *See* (Vol. II, E7, p.10 (2023–25 contract); (Vol. V, E500, p.7) (2021–23 contract); (Vol. VI, E501, p.7) (2019–21 contract). As the CIR explained below, "it is undisputed that the State has implemented and used telework (remote work) policies and agreements for many years." (T267).

Consistent with these express contractual reservations, the State has consistently maintained that remote work (sometimes called "telework") "is a privilege and may not be available to every person and position." *See*, *e.g.*, (T41). Indeed, state agencies, such as the Department of Administrative Services, have routinely promulgated policies which indicate remote work is "not an entitlement or an organization-wide benefit and does not affect or modify the existing terms and conditions of employment with the State of Nebraska." (*Id.*); *see also* (T45–54) (DHHS remote work policy); (Vol. VI, E508, p. 4) ("Telecommuting agreements may be terminated at any time for any reason by [the Nebraska Department of Revenue], with or without cause."). The CIR found that "[e]very [public] employee called to testify on behalf of the Union admitted they were subject to [a remote work] polic[y] . . . and [they] understood that telecommuting was a privilege that could be terminated by the State at any time for any or no reason." (T267).

Before this case, NAPE never complained about the State's longstanding practice of permitting or refusing to authorize telework case-by-case. *See* (T267) ("[T]he Union has never filed a

grievance over the use of . . . telework policies or agreements" or over "the revocation of an employee's ability to work remotely thereunder"). On the contrary, the record contains numerous examples of remote or telework privilege revocations the Union neither challenged nor complained about. (Vol. I, 192:1–5, 268:12–22, 49:10–16, 260:20–261:3; 268:23–270:10).

During the extraordinary circumstances that arose during the COVID-19 pandemic, the State encouraged public employees to work remotely. *See* (Vol. II, E9, p.7) ("Agencies are encouraged to be as flexible as possible to provide telework, remote work, and ready to work status options to [public employees] as needs may dictate."). In May 2021, as the pandemic waned, then-Governor Ricketts issued Executive Order 21-05. (Vol. VI, E503, pp.1–2) (the "Return-to-Work Order"). The Return-to-Work Order explained that it was "important . . . to transition back to a more normal way of life," which included "returning more people to the workplace." (*Id.*). The order then instructed agency heads to ensure that "all [public employees] immediately return to in-person working" unless an employee was "considered work-from-home for non-COVID-19 purposes." (*Id.*). NAPE did not request to bargain or otherwise challenge the Return-to-Work Order.

During negotiations for the current CBA, NAPE initially proposed a contractual term stating that "remote work assignments may benefit both the employee and employer . . . [especially] when the employee is unable to commute to his/her assigned worksite due to conflicting work/family commitments, physical disability/limitations, public health emergency, or other reasons." (Vol. VI, E513, p.9, E511, pp.1–2). The proposed term would have guaranteed to employees that their "remote work . . . requests will not be unreasonably denied." (Vol. VI, E513, p.9, E511, pp.1–2). But NAPE withdrew that proposal during

bargaining. (Vol. I, 89:1-6; Vol. I, 290:11–291:14). It did so because of concessions obtained from the State, including a significant across-the-board wage increase. (Vol. I**,** 289:5-290:8); *see also* (T266).

Thus, the CBA produced by the parties' negotiations omitted the Union's proposed remote-work term, (Vol. I, 289:5–291:14; Vol. VI, E513, p.2), instead retaining only the consistently-included reservation of the State's authority to "change, modify and alter the composition and site of the work force." (Vol. II, E7, p.10). As is customary, the final CBA declared that "the understandings and agreements arrived at by the parties after the exercise of that right and opportunity [to make demands and proposals] are set forth in this Contract." (*Id.* at p.6).

In November 2023, Governor Pillen issued the Remote Work Order. (Vol. VI, E502, pp.1–2). The order noted that an examination of the State's workforce revealed, notwithstanding Governor Rickett's prior Return-to-Work Order, that "a significant portion of [the State's] workforce remains in hybrid or remote work arrangements which were implemented during the COVID-19 pandemic." (*Id.* at p.1). The Remote Work Order recognized that the pandemic was fully over and asserted the Governor's belief that "the people of Nebraska expect their elected leaders to restore Nebraska's public servant workforce to the posture it was in prior to the pandemic." (*Id.*).

The Remote Work Order restored the default rule of in-person work; subject to certain exceptions, public employees were directed to "perform their work in the office, facility, or field location assigned by their agency and not from a remote location." (*Id.*) The Remote Work Order did not, however, *prohibit* remote work. Indeed, it identified at least five circumstances under which remote work could be permissible. (*Id.* at p.2). The Remote

Work Order did require remote work be assessed on an "individualized basis and be approved by [an] agency head." (*Id.*).

PROCEDURAL HISTORY

Despite the current CBA's clear reservation to the State of discretion over employee site of work—a reservation crystallized by the withdrawal of the proposed remote work provision during negotiations—NAPE, following issuance of the Remote Work Order, demanded the State bargain over the issue of remote work. (Vol. II E2, E4). The State declined. (Vol. II, E3, E5). NAPE then filed its prohibited practice petition in the CIR. (T3–13).

That petition alleged that the State had made a "unilateral change to, and refusal to negotiate in good faith over, a mandatory subject of bargaining" under the Industrial Relations and Collective Bargaining acts. (T4). NAPE also moved for temporary relief to "preserve and protect the status of the parties, property, and public interest involved pending final determination of the issues." (T17–18).

After the State answered, (T24–28), the CIR granted NAPE's motion for temporary relief. (T29–31). That action did not reflect an assessment of the merits of NAPE's petition because the Commission is "prohibited" from assessing the merits at that preliminary stage. (T31). Instead, the CIR sought only to "preserve and protect the public interest and the status of the parties prior to the final determination of the issues." (T30). The Commission declared that the status quo ante was preserved by adherence to the "agency policies relating to remote work assignments, and the application of those policies, which were in place just prior to the issuance of the Executive Order." (T31).

Some confusion arose regarding the precise effect of the CIR's temporary relief order. As discussed above, many of the State's remote work policies (in place prior to the proclamation of the Remote Work Order) permitted unilateral, discretionary cessation of an employee's authorization to remote work. *See* p. 11, *supra*. So some State agencies continued revoking remote work authorizations—relying on their preexisting policies, *not* the Remote Work Order. *See, e.g.,* (T38–39).

NAPE responded to these revocations with a motion (in district court) to hold the State in contempt. (T57–61). That prompted the State to seek clarification of the CIR's temporary relief order. (T37–40). NAPE objected. (T55–56). The CIR issued a clarification in which it said that "the remote work status of the members of the [b]argaining unit involved in this case was *not to be altered* during the pendency of this case." (T76).

NAPE then moved to compel discovery and to continue the deadlines associated with its petition. (T81–82). The State opposed, arguing NAPE's discovery requests were overly broad and unduly burdensome. (T155–58). In so doing, the State highlighted NAPE's ulterior motive of seeking delay: "The Union—not justice—is the only one who benefits from a continuance . . . the Union has significant motivation to continue this proceeding in perpetuity so that the Union's membership drive can continue, and the Commission's status quo orders remain in place." (T159). Indeed, later testimony and evidence showed that pursuing the petition bolstered NAPE's campaign to increase its dues-paying membership. (Vol. VI, E516–17; Vol. II, 305:3–315:13). Documents produced by the Union established that when employees called about the Remote Work Order, union representatives solicited them to become dues-paying members. (T168–207). Solicited

employees joined NAPE as dues-paying members "in record numbers." (Vol. VI, E516, p.1).

The CIR denied NAPE's motion to compel discovery. It agreed with the State that "[t]he disputed requests are overly broad, unduly burdensome, and without any tie to potentially relevant or admissible evidence for the Commission's consideration in deciding this dispute." (T221–22).

After a hearing, (T80), and additional briefing, (T225–63), the CIR dismissed the prohibited practice petition with prejudice. (T264–73). The Commission held that the CBA protected management's (the State's) ability to determine its employees' site of work and, alternatively, that NAPE's proposal—and subsequent withdrawal—of a new remote work provision constituted a waiver of any right to demand bargaining on the issue for the duration of the CBA. (T268–71).

Additionally, the CIR found NAPE's petition to be both frivolous and motivated by improper ulterior motives rather than being pursued in good faith. (T271–273). NAPE's bad faith led the CIR to award attorneys' fees to the State. (T274–80).

After an initial premature effort, *see Nebraska Association of Public Employees Loc. 61 v. Nebraska*, No. 24-610 (Neb. Oct. 17, 2024), NAPE now timely appeals, (T81–82).

SUMMARY OF THE ARGUMENT

This is a straightforward case. The labor relationship between public employees represented by NAPE and the State is governed by a CBA. The plain language of that CBA reserves to the State the right to "change, modify and alter the composition and site of the work force." It also grants the State the right to "transfer [and] assign employees." This contractual language

unambiguously indicates that the State controls *where* the public employees represented by NAPE work. Control over where an employee works necessarily embraces the subject of working remotely. Thus, remote work is a subject "covered by" the CBA.

So too are remote work policies. The CBA expressly provides that the State can "adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures or policies." That means the State can adopt a remote work policy and grant remote work authorizations under that policy—or not—at its discretion. And if the State adopts a remote work policy, then later decides to change course, the CBA permits that too. Governor Pillen's Remote Work Order falls squarely within this authority.

When a subject is covered by a CBA—as remote work was here—parties have no obligation to bargain with respect to that subject. Instead, if a dispute arises, the rule of decision is simple: The CBA governs. The CIR applied this straightforward principle when it dismissed NAPE's petition claiming the State had failed to bargain in good faith. The Commission's ultimate determination—that the State had no obligation to bargain here—was sound and should be affirmed.

Upon the State's motion, the CIR concluded that NAPE's petition was frivolous and awarded the State attorneys' fees. That fee award should also be affirmed. The frivolity of NAPE's motion is readily apparent. Indeed, its argument was foreclosed three times over. The subject of remote work was "covered by" the plain language of the CBA, and thus not a proper subject of bargaining. But even if it had not been covered, NAPE had waived any right to bargain on the subject by proposing and then withdrawing (in exchange for other concessions) a more favorable remote work policy proposal during the negotiations that produced the CBA. That bargaining history constituted an unmistakable

waiver of its right to bargain on the subject. And even if those two arguments had, against all the evidence, been resolved in NAPE's favor, the Union's bargaining request would have *still* been inapt, because control over something as fundamental as the assignment and transfer of employees is a management prerogative that is never a mandatory subject of bargaining.

Given the extreme weakness of its merits position, the CIR correctly determined that NAPE's petition was pursued in bad faith to achieve an impermissible ulterior motive. That conclusion is supported by the record. And NAPE's arguments that the CIR lacks the authority to award fees to the State are as frivolous as its petition was. Nebraska's labor law incorporates by reference the statutory provision that authorizes district courts to award attorneys' fees upon a determination that a party has advanced a frivolous claim. The CIR properly relied on that authority when it awarded the State's request for attorneys' fees.

The CIR's dismissal of NAPE's petition and award of attorneys' fees should be affirmed.

ARGUMENT

I. The State Had No Obligation to Bargain About Remote Work or Remote Work Policy.

The CIR correctly held that the State did not engage in a prohibited practice when it declined to bargain over remote work. (T271). The Commission concluded that the plain language of the CBA "specifically allows the [State] to unilaterally change work sites and related policies." (*Id.*). The Remote Work Order was "clearly 'covered by' the CBA," and therefore the State had no obligation to "bargain the issue." (*Id.*). That conclusion is sound and should be affirmed.

A. The issue of remote work is covered by the CBA.

When "a topic is covered by [a] collective bargaining agreement, then the parties have no further obligation to bargain the issue." *Fraternal Ord. of Police Lodge 31 v. City of York*, 309 Neb. 359, 372 (2021). "A subject covered by a collective bargaining agreement has already been fully negotiated, and the public employer, by following the agreement's provisions, [has] not refused to negotiate collectively" with a union or other representative of its employees in good faith. *Id.*

A topic is "covered by" a CBA when that topic is "'within the compass' of the terms of the agreement." *Id.* at 373 (quoting *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 377 (D.C. Cir. 2017)). The ultimate touchstone of this inquiry is the intent of the parties. *Id.* at 373–74. There "need not be an 'exact congruence' between [a] matter in dispute" and the language in a CBA, so long as the language of the CBA "expressly or implicitly indicates the parties reached a negotiated agreement on the subject." *Id.* (quoting *Fed. Bureau of Prisons v. Fed. Lab. Rels. Auth.*, 654 F.3d 91, 94 (D.C. Cir. 2011)).

The CBA's plain language establishes that remote work is "covered by" the agreement. *See* (T271) ("We find no vagueness or ambiguity in the relevant sections of the CBA as applied to the issue of remote work."). Article III of the CBA addresses "Management Rights." (Vol. VI, E501, p. 5). Several provisions in Article III are telling. *See* (T266-67).

Chief among them is Provision 3.8, which unambiguously reserves to the State control over the "site of the work force" and thereby necessarily affords the State discretion to authorize

remote work (or not) and exercise control over its contours and availability. In full, Provision 3.8 provides that the State has:

> 3.8 The right to increase, reduce, change, modify and alter the composition and site of the work force.

(Vol. VI, E501, p. 6).

The meaning of this language is clear. A "site" is "[a] place or location." Site, Black's Law Dictionary (12th ed. 2024); *see also* Site, Oxford English Dictionary (Dec. 2024) ("A place where something happens or has happened; the location *of* a specific event, occurrence, or activity."). The "work force" is "all the workers engaged in a particular activity or enterprise." Workforce, Black's Law Dictionary (12th ed. 2024); *see also* Workforce, Oxford English Dictionary (July 2023) ("People engaged in or available for work."). Thus, the plain text of Provision 3.8 secures the State's right to "change, modify and alter" the "place or location" where public employees are "engaged in a particular activity or enterprise."

The State's broad authority to control the availability of remote work is reinforced by Provision 3.12, which reserves to the State:

> 3.12 The right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures or policies.

(Vol. VI, E501, p. 7). This provision confirms that the State (and its constituent divisions, departments, and agencies) can freely adopt remote work policies while retaining unfettered discretion to amend or revoke those policies at a later date. It forecloses any argument that the mere promulgation of such a policy (or any particular authorization extended to an individual or class of employees under a promulgated policy) engrafts an entitlement to

remote work atop the labor-management relationship governed by the CBA.

Taken together, Provisions 3.8 and 3.12 illustrate why the CIR concluded remote work is covered by the CBA. Provision 3.8 gives the State control over *where* public employees perform their work. And *where* employees perform their work necessarily encompasses remote work, *i.e.*, whether work must be performed in-person at a particular job site or can instead be done remotely. And Provision 3.12 confirms that the State can *change its mind* about *where* public employees perform their work.

These provisions straightforwardly resolve this case. As the CIR explained, "[t]he plain language of the long-standing management rights article [Article III] . . . specifically allows [the State] to unilaterally change work sites and related policies." (T271). That leads to the inescapable conclusion that the "subject of [the Remote Work Order] is clearly 'covered by' the CBA and well within the management rights retained by the State." (*Id.*). After all, "imposing . . . [a CBA's] provisions in relation to [a covered] topic does not interfere with" the rights secured by the Industrial Relations or Collective Bargaining acts. *City of York*, 309 Neb. at 372. These two provisions (3.8 and 3.12), standing alone, are enough to sustain the CIR's dismissal of NAPE's petition with prejudice. (T271).

However, those two provisions do not stand alone. At least four other provisions in Article III reinforce the State's authority over the allocation and disposition of its work force and thus, concomitantly, over remote work. Provisions 3.4, 3.5, 3.6, and 3.7 grant the State:

3.4 The right to establish, allocate, schedule, assign, modify, change and discontinue Agency operations, work shifts, and working hours.

3.5 The right to establish, allocate, assign, or modify an employee's duties and responsibilities and the resulting classification of such duties and responsibilities.

3.6 The right to establish, modify, change and discontinue work standards.

3.7 The right to hire, examine, promote, train, transfer, assign, and retain employees; suspend, demote, discharge or take other disciplinary action against employees for just cause; and to relieve employees from duties due to lack of work or funds, or the employee's inability to perform his/her assigned duties after the Employer has attempted to accommodate the employee's disability.

(Vol. VI, E501, p. 5). This language—especially Provision 3.4's power to "assign, modify and discontinue . . . work shifts and working hours" and Provision 3.7's reservation of the "right to . . . assign" employees—reinforces the conclusion that remote work is "covered by" the CBA. *Cf. Am. Fed'n of Gov't Employees, AFL-CIO, Loc. 1336 v. Fed. Lab. Relations Auth.,* 829 F.2d 683, 686 (8th Cir. 1987) (recognizing that an employer may "assign employees . . . to the location where the work required their presence"); *Tiltti v. Weise*, 155 F.3d 596, 601 (2d Cir. 1998) ("The geographical assignment of individual employees is ordinarily within the discretion of the employing agency.").

The Union's only rejoinder is the assertion that "remote work . . . *is not mentioned at all*" in the CBA. NAPE Br. at 28 (emphasis in original). That argument cannot survive even minimal contact with the relevant doctrine. While the specific phrase "remote work" does not appear in the CBA, courts do not apply a "magic words" test. Instead, "[i]n determining whether [a subject] is covered by a collective bargaining agreement, [courts have] consistently . . . rejected . . . attempts to require [a CBA] to specifically mention, specifically refer to, or specifically address" the subject in question. *Wilkes-Barre Hospital,* 857 F.3d at 376 (internal citations and quotation marks omitted) (cited with approval

in *City of York*, 309 Neb. at 373). Accordingly, a subject can be "covered by an agreement even if the agreement does not clearly and unmistakably address that particular subject." *Id.*

This holistic and contextual assessment is applied because it is "unrealistic" to expect a CBA to "specifically address" every "conceivabl[e]" issue that might arise in the course of a management/labor relationship. *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 118 (2012). What ultimately matters is the *intention of the parties*—properly "ascertain[ed] . . . from the plain language of the contract," *see*, *e.g.*, *Seemann v. Seemann*, 316 Neb. 671, 677 (2024))—not the presence or absence of an "exact congruence between the matter in dispute" and the language of the CBA. *City of York*, 309 Neb. at 373.

As discussed, the CBA's plain language makes the parties' intention here quite evident: The State can properly exercise control over *where* public employees can perform their work. That necessarily includes working remotely.

B. The Union's withdrawal of its proposed remote work provision waived any right to demand bargaining on the subject.

When a CBA expressly covers a subject, courts need not consider waiver. As this Court has explained, the "covered by" inquiry is an "analytically distinct" "threshold question." *Douglas Cty. Health*, 284 Neb. at 115, 116. It is unnecessary to examine waiver unless it is first determined that a "subject was *not* covered by the collective bargaining agreement." *City of York*, 309 Neb. at 372 (emphasis added).

Here, the CIR concluded that remote work was "covered by" the CBA and that this determination resolved the case. *See*

(T271). Nevertheless, the Commission alternatively held that if remote work was not covered by the CBA, it would "still dismiss th[e] petition," applying the doctrine of unmistakable waiver. (T272) Although this Court need not address the issue, that conclusion was correct and is a suitable, alternative basis to affirm.

Nebraska law recognizes it is "possible for employees or their representatives to waive the right to bargain" on an otherwise mandatory subject of bargaining. *Serv. Emps. Int'l Union (AFL-CIO) Loc. 226 v. Douglas Cty. Sch. Dist. 001*, 286 Neb. 755, 765 (2013). Such a waiver can either be explicit or "implied from the structure of an agreement and the parties' course of conduct." *Id*. An implied waiver requires a clear indication that the "parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *Hogelin v. City of Columbus*, 274 Neb. 453, 461 (2007). And such a clear indication can come from "bargaining history [that shows] the parties . . . consciously explored or fully discussed the matter on which the union has consciously yielded its rights." *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357–58 (D.C. Cir. 2008) (internal citations and quotation marks omitted).

That is what happened here. During negotiations for the current CBA, NAPE proposed the inclusion of a provision that would have modified the State's longstanding reservation of management's right to assign workers to a particular worksite and explicitly incorporated a (limited) entitlement to engage in remote work. (Vol. VI, E513, p.9). Under the proposed term, public employees would have been able to "request remote work assignments, and [those] requests w[ould] not be unreasonably denied." (*Id*.); *see also* (E511, p.1–2). Moreover, the proposal would have enshrined in the CBA recognition that remote work assignments "benefit both [public] employee[s] and [the State]" and outlined

certain circumstances in which remote work assignments would "particularly" benefit employees. (Vol. VI, E513, p.9).

As noted above, this provision was withdrawn during CBA negotiations. (Vol. I, 89:1-6; Vol. II, 290:11–291:14). As the CIR explained, NAPE withdrew the proposal in exchange for "a 'historic' and 'record-breaking' contract that provided bargaining unit members with 'the largest salary increase in the 35-year history of the . . . Collective Bargaining Act." (T285). This is precisely the sort of bargaining history that demonstrates a union has unmistakably waived a right. *See*, *e.g.*, *Fed. Lab. Rels. Auth. v. I.R.S. (Dist. Off. Unit), Dep't of Treasury*, 838 F.2d 567, 569 (D.C. Cir. 1988) (Edwards, J., concurring in the denial of initial hearing en banc) ("[W]here a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter which was withdrawn would be found."). In short, NAPE "consciously explored" a more advantageous and employee-friendly remote work provision, but ultimately chose to prioritize other considerations. In so doing, it waived its right to demand further bargaining on remote work for the duration of the current CBA. *See City of York*, 309 Neb. at 325 (emphasizing the "importance of finality to collective bargaining").

NAPE's implied waiver is reinforced by the CBA's "zipper clause," *see* (T285), in which the parties expressly agreed that "for the duration of [the CBA]" both parties "voluntarily and unqualifiedly waive[d] the right . . . to bargain collectively with respect to any subject or matter referred to, or covered in" the CBA. (Vol. VI, E501, p. 3). That waiver was predicated on the parties' mutual recognition that "during the negotiations which resulted in [the CBA] . . . [both sides] had the right and opportunity to make demands and proposals . . . and that the understandings and

agreements arrived at by the parties after the exercise of that right and opportunity are set forth" in the CBA. (*Id.*). NAPE cannot reasonably suggest, after offering an explicit remote work provision and then withdrawing that provision in exchange for other concessions, it intended to nevertheless demand the right to bargain about remote work. Instead, the zipper clause reflects the parties' mutual recognition that, for the duration of the CBA, only subjects covered by the CBA *but not definitively settled by its contractual language* would be subject to bargaining. *Cf. Dep't of Treasury*, 838 F.2d at 569. Because the CBA's treatment of remote work was definitively settled, *see* pp. 19–23, *supra*, it was not a proper subject for further bargaining.

C. Requiring in-person attendance is an inherent management prerogative not subject to bargaining.

Nebraska labor law only requires parties to "bargain over mandatory subjects." (T288); *see Scottsbluff Police Officers Ass'n, Inc., F.O.P. Lodge 38 v. City of Scottsbluff*, 282 Neb. 676, 683 (2011). Mandatory subjects include "wages, hours, and other terms and conditions of employment." *Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 24 (2002); *see* Neb. Rev. Stat. § 48-816(1)(a).

By contrast, however, some subjects are considered "management prerogatives." *City of Scottsbluff*, 282 Neb. at 683. Those prerogatives, which include "the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments" are "not mandatory subjects of bargaining." *Id.* Thus, an employer *never* has an obligation to bargain with respect to a management prerogative. *See Sch. Dist. of Seward Ed. Ass'n v. Sch. Dist. of Seward*, 188 Neb. 772, 784 (1972) (employers are

"not . . . required to enter negotiations on . . . management prerogatives.")

The CIR's decision below assumed that remote work was subject to mandatory bargaining. *See* (T269, 270). The Union agrees. *See* NAPE Br. at 25–27. As discussed, the CIR's decision reached the correct ultimate conclusion: That the State was under no obligation to bargain about remote work. Because that judgment is correct, the State has elected to defend it under the assumption that remote work is a proper subject of mandatory bargaining.

That said, should this Court disagree with the CIR as to both rationales articulated above—that is, if the Court believes both that remote work is *not covered* by the CBA and that NAPE has *not waived* its right to bargain on the subject—the Court must address the threshold question of whether an employer demanding its employees perform work in-person is a management prerogative.

It is. Management prerogatives are certain issues over which an employer must have "exclusive" control. The necessity of exempting some essential subjects from bargaining is predicated on the understanding that "[m]anagement must be free from the constraints of the bargaining process" when it is "essential for the running of a profitable business." *See First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). This principle is readily transferable to the public sector; the efficient delivery of essential government services requires public employers receive similar leeway. *See, e.g., City of Allentown v. Int'l Ass'n of Fire Fighters Loc. 302*, 157 A.3d 899, 906 (Pa. 2017) (the managerial prerogatives of a public body are not "subject to the bargaining process" because they are "essential to [that body's ability to] manag[e] its employees and provid[e] government services"); *cf.*

City of Bos. v. Bos. Police Superior Officers Fed'n, 29 Mass. App. Ct. 907, 908 (1990) ("The demands of public safety . . . underscore the importance of management control over matters such as staffing levels, assignments . . . and definition of duties").

The right to control "transfers and assignments," *City of Scottsbluff*, 282 Neb. at 683, is a managerial prerogative that ultimately makes the availability (or lack thereof) of remote work qualify as one as well. In the labor context, assignment means "the act of assigning a task, job, or appointment." Assignment, Black's Law Dictionary (12th ed. 2024). Assignments often vary by location. *See Weise*, 155 F.3d at 601 ("The geographical assignment of individual employees is ordinarily within the discretion of the employing agency."). Similarly, "transfer" contextually concerns the movement or reassignment of an employee from one job or location to another. *See* (Vol. II, 337:10–18); *see also Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 525 (1991) (describing the shifting of "employees . . . for work at another facility" as a "transfer"); *see also Cont'l Oil Co. v. NLRB*, 113 F.2d 473, 484 (10th Cir. 1940) (transfer of employees from one oil field work site to another); *NLRB v. Varo, Inc.*, 425 F.2d 293, 301 (5th Cir. 1970) (describing a "transfer" as moving "an employee from one job or location to another"). Thus, at bottom, both transfer and assignment most commonly embrace the notion of *where* an employee will perform work.

As outlined, *see* p. 21, *supra*, *where* employees perform their work necessarily encompasses the issue of remote work. If an employer can require an employee to work at a particular jobsite, they can preclude that same employee from working remotely. To conclude otherwise would be a contradiction in terms. And given that assignment and transfer—which allow an employer to dictate *where* an employee will work—are firmly

established managerial prerogatives, *see City of Scottsbluff*, 282 Neb. at 683; *City of York*, 309 Neb. at 371; *Douglas Cty. Sch. Dist. 001*, 286 Neb. at 762, the availability of remote work is *also* a managerial prerogative.

Precedent supports this conclusion. "Non-lawyers would readily understand that regular on-site attendance is required for [most] jobs." *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015). Such attendance is understood to be "the basic, most fundamental activity of their job." *Id.* As one court put it, in-person attendance is the "commonsense" default. *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004). Thus, most employers correctly assume that they need not explicitly tell their employees they are "actually required to show up at the workplace"—the expectation to show up "is a given." *Id.* This effectively universal understanding flows from the fact that "[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1239 (9th Cir. 2012).

To be sure, some exceptions exist; not every job *requires* in-person attendance. But the mere fact that a job can, in theory or to some limited degree, be performed remotely does not make assignment and transfer—which, again, represents control over *where* an employee will work—any less of a managerial prerogative. For one, as the Remote Work Order recognizes, it is widely understood that "people are most productive when they are working together in the office and not remotely." (Vol. VI, E502, p. 1–2). *Cf. Kinney v. St. Mary's Health, Inc.,* 76 F.4th 635, 644 (7th Cir. 2023) ("the fact that many employees were able to work remotely temporarily when forced to do so by a global health crisis

does not mean that th[eir] jobs do not have essential functions that require in-person work over the medium to long term"). This is true even for jobs that might seem especially well-suited to remote work. *See* Gibbs, Mengel, & Seimroth, *Work from Home and Productivity: Evidence from Personnel and Analytics Data on Information Technology Professionals*, Journal of Political Economy Microeconomics, Volume 1, No. 1 (February 2023) available at https://perma.cc/54FN-NTB7 (finding, in study of "high-skilled" professionals who transitioned to remote work, that "output per hour of work declined by 8%–19%").

But even more fundamentally, "certain managerial matters 'strike at the heart of policy decisions that directly implicate the public welfare.'" *City of Allentown*, 157 A.3d at 906 (quoting *Borough of Ellwood City v. Pennsylvania Lab. Rels. Bd.*, 998 A.2d 589, 600 (Pa. 2010). "[P]ublic employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible." *Borough of Ellwood*, 998 A.2d at 600. It is difficult to imagine a more fundamental policy decision than *where* public employees perform their important work.

II. The Award of Attorneys' Fees Should Be Affirmed.

In its initial order dismissing NAPE's petition, the CIR concluded that the "totality of the record before the Commission demonstrates that [the Union] engaged in a pattern of willful, flagrant, aggravated, persistent, and pervasive prohibited misconduct" and thus had "pursu[ed] th[e] action in bad faith." (T273). It therefore deemed it appropriate to award the State "costs and fees." (*Id.*). In a subsequent order, the CIR considered the evidence submitted regarding the fees incurred and awarded the

State $42,234.63. (T274–280). NAPE argues that in so doing, the CIR "exceeded its authority" to award fees. NAPE Br. at 25.

Not so. The Commission acted within its authority and its fee award is properly supported by the record. This Court should affirm.

A. The Commission has the power to award attorneys' fees in appropriate circumstances. The Industrial Relations Act "grant[s] the commission the authority to issues such orders as it may find necessary to provide adequate remedies to the parties [and thereby] to effectuate the public policy enunciated in [the Act]." (T275) (citing Neb. Rev. Stat. §§ 48-819.01 and 48-825(2)). This statutory grant of authority is confirmed by this Court's case law. *See Emps. United Lab. Ass'n v. Douglas Cty.*, 284 Neb. 121, 129 (2012); *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88 (2007).

The manner in which the Commission exercises this discretionary authority is also dictated by the Industrial Relations Act. Section 48-812 provides that "proceedings before the commission" shall "conform to the code of civil procedure applicable to the district courts of the state." Neb. Rev. Stat. § 48-812. That is an incorporation by reference of Section 25-824, which authorizes district courts to "assess attorney's fees and costs" when the tribunal determines that "an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment." Neb. Rev. Stat. § 25-824(4). The CIR expressly invoked this mechanism for implementing the power set forth in the Industrial Relations Act. (T276–77).

NAPE's argument that the CIR exceeded its authority is predicated on the purported inapplicability of CIR Rule 42. *See*

NAPE Br. at 33. But its arguments in that vein are entirely beside the point. At most, CIR Rule 42 helps guide the Commission's implementation of the remedial authority granted by the Industrial Relations Act. And as its fee order plainly states, the CIR did not rely on Rule 42 as the *sole* basis for its authority to impose a fee award. On the contrary, the Commission declared that "even absent Rule 42, [the State] is entitled to attorney fees under Neb. Rev. Stat. § 25-824." (T277). Thus, NAPE's arguments that the CIR exceeded its authority—which are entirely predicated on CIR Rule 42, other CIR rules, and precedent interpreting the same, *see* NAPE Br. 33–34—set up a strawman and then attempt to pound it flat. What NAPE has failed to do, however, is offer even a single sentence explaining why the CIR lacks the authority to award fees under the *statutory* sections upon which the Commission actually relied. Accordingly, its argument that the fee award is ultra vires necessarily fails.

B. NAPE's arguments regarding the merits of the fee award fare no better. The awarded fee was reasonable and supported by "a preponderance of the competent evidence." *Omaha Police Union Loc. 101, IUPA, AFL-CIO v. City of Omaha*, 274 Neb. 70, 88 (2007). Furthermore, the Commission's determination can only be set aside for abuse of discretion. *See Korth v. Luther*, 304 Neb. 450, 474 (2019). That high bar has not been surmounted here.

The decision to award fees was reasonable because NAPE's prohibited practice petition was frivolous. A legal argument is frivolous when it is "wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit." *George Clift Enterprises, Inc. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 816 (2020). A frivolous position is one that is "ridiculous" and "connotes an improper motive." *Id.*

NAPE's petition meets that standard. As the CIR explained, when NAPE filed its petition, it knew all about "the long existing telework policies, procedures and agreements promulgated under the State's management rights under which its members ha[d] [long] been working." (T272). Yet it had never before challenged any revocation of remote work authorization or previous changes in State policy (such as Governor Rickett's Return-to-Work Order). *See* (T267). The Union also knew that it had waived its right to bargain with respect to "matters covered by the CBA" and, furthermore, that during negotiations with the State it had "withdr[awn] [its] specific remote work policy proposal," (T272), and thus had waived its right to bargain on the subject even if remote work was not "covered by" the CBA. All together, this led the CIR to conclude that NAPE "could not have reasonably or in good faith believed they would prevail" before the Commission. (*Id.*).

When a legal position is so utterly meritless that it can be labelled ridiculous—as the Union's position here can be—that lack of merit plausibly suggests the party who advanced the position had an ulterior motive. The CIR determined that was so here, finding that NAPE filed its petition in a calculated move to "misuse" the CIR's "status quo protections" and "possibly to increase its membership." (*Id.*). As the Commission explained, the evidence of bad faith practically leapt off the page. "The Commission has not previously had the opportunity to hear a case where the record so clearly showed bad faith on the part of a Petitioner in the filing of a [prohibited practice] Petition itself." (T276–77).

NAPE again resorts to red herring arguments when attacking the CIR's fee award. The Union first contends the Commission's fee award "penalize[es] [it] for highlighting litigation activities in membership recruitment materials" and claims that

sustaining the fee award would have a "pernicious chilling effect" that violates the First Amendment. NAPE Br. at 36; *but cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("[B]aseless litigation is not immunized by the First Amendment right to petition."). But NAPE misunderstands the basis for the fee award. The CIR concluded that the *only explanation* for deploying such a weak legal argument was the presence of an ulterior motive. The evidence of the Union's membership recruitment efforts merely *confirmed* what the weakness of its legal arguments suggested—that something other than the prospect of success on the merits was the driving force behind NAPE's decision to pursue the petition. *See George Clift*, 306 Neb. at 816 (explaining that deploying a ridiculously weak legal argument "connotes an improper motive").

Next, NAPE argues that the CIR's status quo order illustrates that the Union had a "reasonable expectation of success on the merits." NAPE Br. at 37. But that fundamentally misunderstands the standard the CIR deploys at the temporary relief stage. As the CIR explained in its temporary relief order, when considering whether to grant temporary relief the overriding consideration is "maintaining the status quo." (T30). The merits in no way enter into the equation; indeed, the Commission is "prohibited" from "mak[ing] a determination on the merits of the underlying prohibited practice case" when deciding if temporary relief is warranted. (T31). Pointing to a temporary relief order that *expressly disclaims* any consideration of the merits and suggesting that order somehow gave rise to a "reasonable expectation" the petition would ultimately succeed is nonsensical. Indeed, it is emblematic of the frivolous legal arguments NAPE has advanced across the entirety of this case.

One final point. NAPE does not argue on appeal that the size of the award is unreasonable. Nor could it. The evidence presented before the Commission was that the State incurred more than $113,000 in legal fees opposing the Union's frivolous petition. *See* (T274). The CIR ultimately awarded the State only $42,234.63 in fees. (T280). That was reasonable. Nebraska taxpayers were forced to shoulder the cost of fending off a frivolous petition while NAPE reaped the benefits of a membership drive that did "record numbers." (Vol. VI, E516, p.1). Detering future frivolity is an important role played by awards of attorney fees. Affirming the award entered here will reinforce the notion that abuse of legal process, like crime, does not pay.

CONCLUSION

The decision of the CIR should be affirmed.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 8786 words excluding this certificate. This brief was prepared using Microsoft Word 365.

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Certificate of Service

I hereby certify that on Wednesday, May 14, 2025 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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